Case Nos. 18-6023, 18-6101, 18-6102

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK HAZELWOOD (18-6023),
HEATHER JONES (18-6101),
and SCOTT WOMBOLD (18-6102),

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of Tennessee

APPELLEE'S PETITION FOR PANEL REHEARING

Charles E. Atchley, Jr.
Attorney for the United States
Acting under Authority Conferred
By 28 U.S.C. § 515

Francis M. Hamilton, III
Brian Samuelson
Assistant United States Attorneys
800 Market St., Suite 211
Knoxville, TN 37902
(865) 545-4167

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INTRODUCTION

A majority of this panel overturned a jury verdict and vacated three defendants' fraud convictions because the trial court admitted recordings of one defendant—Mark Hazelwood—saying and promoting racist, misogynistic, and offensive things during a company retreat during the same time period as the fraudulent scheme. The United States had proffered the recordings to rebut Hazelwood's assertion that he was too good an executive and businessman to do anything that could jeopardize the company's viability and success.

The majority appears to have misapprehended the purpose for which the recordings were proffered and admitted—to disprove the alleged existence of an obstacle on the path to fraud, rather than to prove any propensity to walk down that path—and failed to afford the appropriate deference to the district court's factual findings. As a result, the opinion creates confusion about whether and how the government may seek to counter good-faith defenses—which are common in white-collar cases—in the future. Additionally, by deeming the recordings unfairly prejudicial "regardless of the quantum of evidence presented," the majority implied that profane, derogatory, and racist statements—which are routinely admitted where relevant in cases involving drugs, firearms, or violent crime—are categorically inadmissible in "less interesting" fraud cases like this one.

The United States respectfully asks the panel to reconsider and vacate its earlier opinion. This Court should hold that (1) Rule 404(b) allows the admission of other-acts evidence to rebut an asserted defense of incapacity to form the *mens rea* for a charged offense, and (2) the district court's admission of the recordings in this case, paired as it was with a clear limiting instruction, was consistent with that rule. In short, defendants' convictions should be affirmed, and the Court should proceed to consider their sentencing claims.

BACKGROUND

This case stems from a massive fraud scheme within Pilot Travel Centers, LLC, which operates hundreds of truck stops nationwide and sells billions of gallons of diesel fuel to trucking companies each year. *United States v. Hazelwood*, 979 F.3d 398, 402 (6th Cir. 2020). For more than five years, members of Pilot's direct-sales division induced trucking companies to buy, and keep buying, diesel fuel from Pilot by falsely promising discounted prices and secretly shorting the customers on the promised discounts. *Id.* at 402-03. "The crime succeeded because Pilot possessed infinitely superior information and computational technological skills and power as compared to the victim trucking companies." (R. 733, Sent. Tr. at 20307.)

The fraud's scope was staggering: Pilot ultimately paid $56 million in restitution, $12 million in "make good" payments, and $92 million in penalties

under a criminal enforcement agreement with the United States. (R. 669-2, Declaration at 18351-52.) The offense was "of a magnitude not often seen" (R. 733, Sent. Tr. at 20309), and over a dozen Pilot employees pleaded guilty to conspiring to commit wire or mail fraud. *Hazelwood*, 979 F.3d at 402 n.1.

Mark Hazelwood, Scott Wombold, and Heather Jones were each charged with fraud based on their participation in the scheme. *Id.* at 402. Hazelwood directly oversaw Pilot's direct-sales division, first as a vice president and then as the company's president; Wombold was a vice president who managed the direct-sales division under Hazelwood's supervision; and Jones was an account representative on the direct-sales team. *Id.* at 402-03. The United States laid out its case against each defendant over the course of a 27-day trial. *Id.* at 403.

From opening statements, Hazelwood sought to portray himself "as a busy, brilliant, hardworking, high executive who cared deeply about the continued viability and success of Pilot." (R. 701, Memorandum at 19584.) He insisted that he was "committed to the survival, to the success, and to the relationships and reputation of Pilot," that he "loved" Pilot and had spent 29 years helping to "build and fortify the Pilot brand," and that he "identified greatly with [Pilot's] success and its reputation." (R. 520, Tr. at 1344, 13350, 13361.) The defense elicited testimony that Hazelwood was an "excellent" president and agreement that it would be "incredibly stupid and dumb, from

a business standpoint, to . . . be lying to customers and taking the chance of everything coming down." (R. 336, Tr. at 7471; R. 361, Tr. at 9389.) "The clear implication for the jury was that a person with that level of dedication to Pilot would not engage in the charged scheme" and that Hazelwood "was too good a businessman and too good a company president . . . to have led or joined the discount-fraud scheme." (R. 701, Memorandum at 19585.)

To rebut that defense, the United States sought to introduce evidence that Hazelwood had not always acted in the best interest of Pilot's reputation. It sought to introduce three audio recordings made at a corporate retreat during which Hazelwood, in the presence of subordinates, repeatedly used a racial epithet ("n****r") and requested and celebrated a song containing racist, misogynistic, and sexually explicit lyrics—all while he and his subordinates were making plans for a future sales meeting, discussing Pilot's board of directors, and joking about sensitivity training and Pilot's human resources department. (R. 372, (Sealed) Motion, 9733-78; GX 529-A, 530-A, 531-A, A584-88.) The trial court found that the comments "during a work meeting" (R. 455, Memorandum at 11704) posed a significant threat to Pilot's reputation: "[I]f it became known that the president of Pilot engaged in vile, despicable, inflammatory, and offensive racial epithets against African-

Americans, this could have led to boycotts, protests, and loss of customer support and business." (R. 374, Tr. at 9976.)

After conducting an *in camera* hearing, the trial court identified multiple grounds for admitting the recordings. (R. 374, Tr. at 9963-78; R. 375, (Sealed) Tr. at 9995-10016; R. 455, Memorandum, 11695-11712.) It found they were admissible under Rule 404(a)(2)(A) as rebuttal evidence to Hazelwood's "alleged character for sound business judgment." (R. 455, Memorandum at 11699.) They were relevant under Rule 401 even if Hazelwood's defense was not based on character evidence. (*Id.* at 11700-01.) And they involved a proper purpose under Rule 404(b)—*i.e.*, to show that "Hazelwood was not, in fact, too good a businessman and company president for Pilot to engage in conduct which, if it became known, would put Pilot at serious risk." (*Id.* at 11704.) The court further found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendants nor the risk of confusing the issues, misleading the jury, or wasting time. (*Id.* at 11705-11.)

Before the recordings were played, the court instructed the jury it could consider the recordings for the "limited purpose" of determining "what, if any, weight should be given to certain evidence that was elicited during cross-examination by counsel for Mr. Hazelwood regarding whether Mr.

Hazelwood was a good businessman, an excellent company president, and whether in those roles Mr. Hazelwood would engage in conduct that ran the risk of putting the company in jeopardy" or "risked that customers would not only not deal with Pilot Travel Centers but would go to competitors" if that conduct was discovered. (R. 424, Tr. at 10420-22.) The jury was told the evidence did "not go to any of the elements of the offenses" with which Hazelwood had been charged and was offered only "to contradict other evidence" the jury had already heard. (*Id.* at 10421-22.) It was told it could "not use this evidence for any other purpose" and that it could not "and must not use this evidence by itself to decide that Mr. Hazelwood is guilty." (*Id.*) And it was told not to consider the recordings "at all" as to Wombold or Jones, because they "pertain[ed] only to Mr. Hazelwood." (*Id.* at 10422.)

Hazelwood was ultimately convicted of wire fraud, conspiring to commit mail and wire fraud, and witness tampering; Wombold was convicted of wire fraud; and Jones was convicted of conspiracy to commit mail and wire fraud. (R. 484, Verdict, 12376-78.) Each defendant was acquitted of at least one other offense, and a fourth defendant was acquitted entirely. (*Id.*) The district court sentenced Hazelwood to 150 months' imprisonment, Wombold to 72 months' imprisonment, and Jones to 33 months' imprisonment. (R. 731,

Hazelwood Judgment, 20085-91; R. 743, Wombold Judgment, 20797-803; R. 745, Jones Judgment, 20808-14.)

This panel, divided, reversed all three defendants' convictions. *Hazelwood*, 979 F.3d at 402. The majority reasoned that the recordings were "vintage bad character evidence." *Id.* Characterizing Hazelwood's comments as "personal beliefs" made in "private," *e.g.*, *id.* at 408, 409, 410, 411, the majority rejected the trial court's rationales for admission, saying, in turn, that "Hazelwood's personal views . . . do not correlate with his business judgment," *id.* at 409 (Rule 401), "the recordings did not cast light on Hazelwood's business skills," *id.* at 410 (Rule 404(a)), "the recordings have nothing to say about Hazelwood's concern for Pilot's reputation," *id.* at 411 (Rule 404(b)), and "the recordings were not relevant to any fact 'of consequence' in this action, *id.* at 412 (Rule 403). The majority found that the recordings posed an "extraordinary risk of prejudice" that likely overpowered "the less interesting evidence of fraudulent fuel pricing." *Id.* at 412, 413. And the majority concluded that the "profoundly racist and sexist content of these recordings is so antithetical to the sensibilities of decent people" that the error was not harmless, "regardless of the quantum of evidence presented." *Id.* at 415.

Judge Donald dissented. *Id.* at 416-26 (Donald, J., dissenting). In her view, Hazelwood's recorded comments were relevant under Rule 401 because

they "make[] a factual assertion elicited by Hazelwood that he was such a good businessman less probable." *Id.* at 418. She found that the comments were properly admitted to rebut Hazelwood's character defense under Rule 404(a)(2), and she faulted the majority for "recharacteriz[ing] the purpose for which the evidence [was] offered [and] unfairly ignoring the proffered justification" under Rule 404(b)—*i.e.*, to "contradict and rebut facts of consequence upon which Hazelwood construct[ed] his defense." *Id.* at 417-21 (internal alteration marks omitted). Hazelwood had "sought as a primary means of defense to depict himself as one whose essential business judgment, being so good, is completely at odds with the possession of a state of mind requisite to guilt." *Id.* at 421 (internal alteration marks omitted). The recorded statements rebutted that defense and were "substantially similar and reasonably near in time to the offenses for which [he was] being tried." *Id.* "Neither the majority nor Hazelwood c[ould] justly contend that such facts were not at risk of becoming public. . . . And given the apparent egregiousness of the recordings, it is no leap to conclude that the disclosure of such to the public here risked Pilot's business just like the fraud scheme." *Id.* at 422.

Judge Donald also would have deferred to the district court's determination that the recordings were not unduly prejudicial under Rule 403. *Id.* at 422-26. She explained that Rule 403 does not "usually" require

exclusion of a defendant's racist or sexist comments, and "courts routinely admit such evidence." *Id.* at 423. And she contested the "underlying assertion that the contents of the recordings are more offensive than the fraud scheme." *Id*. at 424. "Racism, misogyny, and bigotry are not new, but centuries old, and unfortunately, common . . . . To say [they] are more lurid or interesting than a multimillion dollar fraud scheme instituted and condoned by the executives of a national, multibillion-dollar trucking company . . . is questionable." *Id.*

Finally, Judge Donald reasoned that the trial court's limiting instructions and the jury's split verdict weighed in favor of finding the evidence admissible. *Id.* at 425-26. The instruction as to Wombold and Jones "was particularly strong." *Id*. at 425 n.1. "If juries cannot follow an instruction [like that], it is hard to see how such evidence, at least in a criminal conspiracy case . . . could ever serve as evidence." *Id.*

REASONS TO VACATE THE OPINION

I. The majority opinion misapprehends the purpose for which the recordings were introduced and, as written, sows confusion about the government's ability to rebut "good faith" defenses to intent crimes.

The majority reasoned, mistakenly, that the recordings were admitted on the theory that "if the defendant was reckless enough to use language that could risk public outrage against the company, he was a 'bad businessman,' and . . . also reckless enough to commit fraud." *Hazelwood*, 979 F.3d at 402;

but see id. at 418 (Donald, J., dissenting) (correctly recognizing the argument for admission as not one of propensity, but of rebuttal). Hazelwood's defense was that he "was too good a businessman and too good a company president . . . to have led or joined the discount-fraud scheme." (R. 701, Memorandum at 19585.) "If the jury fully believed the testimony elicited by Hazelwood, no reasonable jury would convict [him] of wire or mail fraud." *Hazelwood*, 979 F.3d at 419 (Donald, J., dissenting). That is because intent to defraud is an "essential element" of those crimes, and Hazelwood "effectively lodged a good-faith defense, which seeks to demonstrate a lack of the requisite intent." *Id.* The recordings were offered and admitted to rebut Hazelwood's asserted defense, not to establish any propensity to recklessness or fraud.

Good-faith defenses are common in white-collar criminal cases. One doctor charged with health-care fraud portrayed himself as "dedicated, hard-working and honorable," *United States v. Worthington*, 698 F.2d 820, 827 (6th Cir. 1983); another claimed to have "abundant compassion" for patients, such that he would not have risked their safety with medically unnecessary procedures, *United States v. Patel*, 485 F. App'x 702, 716-17 (5th Cir. 2012). A doctor charged with tax evasion asserted that she "cared nothing for money and chose, instead, to devote her time to the demanding personal needs of her patients," *United States v. Johnson*, 634 F.2d 735, 736 (4th Cir. 1980); a border

patrol agent argued that he valued his job too much to harbor an illegal alien, *United States v. Mireles*, 442 F. App'x 988, 994-95 (5th Cir. 2011); and a police officer charged with a firearms offense claimed to be a "good officer," *United States v. Uzenski*, 434 F.3d 690, 711 (4th Cir. 2006).

In each of those cases, the reviewing court affirmed the admission of counterevidence to rebut the proffered "good faith" defense. To show that the doctor in *Worthington* was not as dedicated and hard-working as he claimed, the government introduced evidence "he had been forced to resign his surgical and radiological residencies because of repeated absences and tardiness." 698 F.2d at 827. To establish that the doctor in *Patel* was not too compassionate to commit the crime, the government introduced evidence that he "called patients derogatory names, silenced complaints as to safety, and engaged in unsafe medical practices." 485 F. App'x at 716. To rebut the *Johnson* defendant's claim that she cared nothing for money, the government introduced evidence that she had previously overstated her Medicaid billings. 634 F.2d at 737. To counter the defendant's claim in *Mireles* that he valued his job too much to commit the charged crime, the government proved that he was "an under performing employee." 442 F. App'x at 994-95. And in response to the "good officer" defense in *Uzenski*, the government presented testimony that the officer made a false radio report and shot at his own patrol car. 434 F.3d at 711.

Those cases—except for *Worthington*, which did not specify the rule under which the evidence was admitted—rooted admission of the evidence in Rule 404(b). *See Patel*, 485 F. App'x at 716; *Johnson*, 634 F.2d at 737; *Mireles*, 442 F. App'x at 994-95; *Uzenski*, 434 F.3d at 711. That makes sense: courts in and out of this circuit have consistently held that rebutting a fact placed at issue by a defendant is a permissible, non-propensity basis to admit evidence under Rule 404(b). *See*, *e.g.*, *United States v. Colon*, 278 F. App'x 588, 595 (6th Cir. 2008) ("government's purpose in offering 404(b) evidence must be 'to prove a fact that the defendant has placed, or conceivably will place, in issue . . . .'" (quoting *United States v. Merriweather*, 78 F.3d 1070, 1076 (6th Cir. 1996))); *United States v. Buentello*, 423 F. App'x 528, 532-33 (6th Cir. 2011) (affirming admission of defendant's disciplinary history under Rule 404(b) to "rebut any false impression that might have resulted from [an] earlier admission" (quoting *United States v. Segines*, 17 F.3d 847, 856 (6th Cir. 1994))); *United States v. Walter*, 870 F.3d 622, 628 (7th Cir. 2017) ("correcting a misleading suggestion or implication can be a valid non-propensity reason for admitting other-act evidence—Rule 404(b)'s list is illustrative, not exhaustive."); *United States v. Havey*, 227 F. App'x 150, 152-54 (3d Cir. 2007) (evidence offered to "rebut[] statements [defendant] made during his direct examination" was properly admitted under Rule 404(b)).

That precedent should have been decisive here, because the recordings served to "contradict and rebut facts of consequence upon which Hazelwood construct[ed] his defense." *Hazelwood*, 979 F.3d at 421 (Donald, J., dissenting). The fact that Hazelwood made and encouraged virulently racist remarks that, if publicly known, would have damaged Pilot's success and reputation directly contradicted his defense that he would never do anything to jeopardize the company. "Use of such evidence to rebut a defense is a proper purpose under Rule 404(b)(2)." *Id*.

By disregarding that settled rule, the majority introduced confusion about when and how, if at all, the government may rebut a "good-faith" defense with counterevidence. The majority implied that the proper response to a good-faith defense was to use "evidence of the crime to argue to the jury that Hazelwood was not a good manager but a thief." *Id*. at 409 n.7. But no amount of evidence of fraudulent activity would matter if a jury credited a defendant's claim that he was "too good" a businessman or "too loyal" a company president to do anything that could harm the company.

By stating that Hazelwood's racist and sexist remarks merely revealed his "seriously misguided personal beliefs," the majority implied that racism can be compatible with good business practices. *Hazelwood*, 979 F.3d at 409-10. It is not. Contrary to the majority's assertion that Henry Ford's anti-Semitism was

a "character flaw" that did not "affect the success of Ford Motor Company," *id*. at 409, Ford's anti-Semitic newspaper articles prompted boycotts of Ford automobiles until Ford issued a public apology and stopped publishing the newspaper in 1927. "Henry Ford and Anti-Semitism: A Complex Story," The Henry Ford, *available at* https://www.thehenryford.org/collections-and-research/digital-resources/popular-topics/henry-ford-and-anti-semitism-a-complex-story/ (accessed Nov. 30, 2020). Ford Motor Company's market share had fallen by approximately 20 percent during that period. Lawrence H. Seltzer, *A Financial History of the American Automobile Industry* 84 (1928). Modern examples likewise confirm the public's intolerance of offensive remarks by corporate executives. (*See* R. 701, Memorandum at 46.)

As written, the majority opinion misapprehends the basis for admitting the recordings, improperly limits the scope of Rule 404(b), and could be interpreted as restricting the government's ability to rebut good-faith defenses in the future, thereby compromising the fairness and integrity of trials in our adversarial system.

II. The majority opinion implies, incorrectly, that offensive and derogatory language is categorically inadmissible in white-collar cases.

"[T]he prejudice occasioned by derogatory language is generally insufficient to warrant exclusion." *United States v. Al-Din*, 631 F. App'x 313, 324 (6th Cir. 2015). Courts routinely admit such evidence where relevant—at

least in cases involving drugs, firearms, or violent crime. *See id.* (affirming, on plain-error review, admission of a defendant's letter featuring "frequent use of the 'N' word" in a drug conspiracy case); *United States v. Stuckey*, 253 F. App'x 468, 483 (6th Cir. 2007) (affirming admission of "profane, offensive, and violent" rap lyrics in murder and drug conspiracy trial); *United States v. Caver*, 470 F.3d 220, 240-41 (6th Cir. 2006) (affirming, on plain-error review, admission of letters with low probative value that used "foul language and derogatory terms" in a drug conspiracy case); *United States v. Owens*, 159 F.3d 221, 224 (6th Cir. 1998) (affirming admission of evidence that defendant enforced racist policies at clubs he owned in a drug, prostitution, and gambling conspiracy case). The majority implied that a different rule applies in cases like this one, stating that the recordings "likely drowned out all weaker sounds of the less interesting evidence of fraudulent fuel pricing" and that admitting them would have been unfairly prejudicial "regardless of the quantum of evidence presented." *Hazelwood*, 979 F.3d at 413, 415 (internal quotation marks and brackets omitted).

The majority's distortion of the usual rule stems from two errors. First, the majority failed to give appropriate deference to the trial court's findings or to "maximize the probative value of the challenged evidence and minimize its potential for unfair prejudice." *United States v. Lloyd*, 462 F.3d 510, 516 (6th

Cir. 2006). For example, the district court found that the comments were made "during a work meeting" (R. 455, Memorandum at 11704), yet the majority repeatedly asserted that they were made "in private" during a "private party." *Hazelwood*, 979 F.3d at 408, 409, 411; *cf. id.* at 417 (Donald, J., dissenting) (explaining that the gathering "was no more private or personal than any other business meeting or retreat held open to a company"). And the district court found that the recordings, if made public, "could have led to boycotts, protests, and loss of customer support and business" (R. 374, Tr. at 9976), yet the majority proceeded on the assumption that Hazelwood's racist and misogynistic comments to his own subordinates "did not cast light on [his] business skills" and "have nothing to say about Hazelwood's concern for Pilot's reputation." *Hazelwood*, 979 F.3d at 410, 411. As the dissent rightly noted, "if Hazelwood is willing to use racist, misogynistic, and otherwise inappropriate language when communicating with his subordinates at a company retreat held for the purpose of conducting business, as well as invite and condone the same statements and behavior by his subordinates, it makes the factual assertion elicited by Hazelwood that he was such a good businessman less probable." *Id.* at 418.

Second, the majority afforded little or no deference to the district court's assessment of the likely prejudicial impact of the evidence on the jury. In close

cases, an appellate court should affirm the trial court's ruling unless it has a "definite and firm conviction that the court below committed a clear error of judgment . . . [,] improperly applie[d] the law, or use[d] an erroneous legal standard." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000) (internal quotation omitted). The majority did not purport to identify any such error here, and it disregarded the presumption that jurors follow the instructions they are given. *E.g.*, *Francis v. Franklin*, 471 U.S. 307, 323 n. 8 (1985); *United States v. Chavis*, 296 F.3d 450, 462 (6th Cir. 2002). Instead, the majority seems to have conducted the Rule 403 weighing for itself. *E.g.*, *Hazelwood*, 979 F.3d at 414 ("we are not persuaded that the district court's limiting instruction eliminated the risk that the jury would misuse the offensive recordings").

Those mistakes matter, and not just to this case. As written, the majority opinion will likely leave district courts wondering how to treat potentially offensive evidence like the recordings at issue here.

CONCLUSION

For the foregoing reasons, as well as those set forth in the government's previously filed brief, the panel should vacate its opinion, affirm defendants' convictions, and proceed to consider their sentencing claims.

Respectfully submitted,

Charles E. Atchley, Jr.
Attorney for the United States
Acting under Authority Conferred
By 28 U.S.C. § 515

By: *s/ Francis M. Hamilton, III*
Francis M. Hamilton, III
Assistant United States Attorney

and *s/ Brian Samuelson*
Brian Samuelson
Assistant United States Attorney
800 Market St., Suite 211
Knoxville, TN 37902
(865) 545-4167

CERTIFICATE OF SERVICE

I certify that, on November 30, 2020, this petition for panel rehearing was filed electronically and notice of its filing will be sent by the Court's electronic case filing system to all parties indicated on the electronic filing receipt, including counsel for defendants.

s/ Francis M. Hamilton, III
Francis M. Hamilton, III
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitation of Fed. R. App. P. 40(b)(1), in that it contains 3,899 words, excluding the cover, table of contents, table of authorities, and certificates of counsel. This certification is based on the word-processing program used to prepare the petition, Microsoft Word 365.

s/ Francis M. Hamilton, III
Francis M. Hamilton, III
Assistant United States Attorney